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In the Supreme Court of the United States

OCTOBER TERM, 1977

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

SAMUEL H. SLOAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B, pp. 3a–17a), as modified (Pet. App. C, pp. 18a–20a), is reported at 547 F. 2d 152.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1976 (Pet. App. A, p. 1a). A timely petition for rehearing was denied on December 27, 1976 (Pet. App. C, p. 18a), and a contemporaneous suggestion for rehearing *en banc* was rejected on January 24, 1977 (Pet. App. F, p. 27a). On March 17,

1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including April 25, 1977, and on April 22, 1977, he granted a further extension to and including May 15, 1977. The petition was filed on Monday, May 16, 1977, and was granted on October 17, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 12(j) and 12(k) of the Securities Exchange Act of 1934, as added by Pub. L. 94–29, 89 Stat. 118, 15 U.S.C. (Supp. V) 78*l*(j) and 78*l*(k), former Section 15(c)(5) of the Act, as added, 78 Stat. 574, 15 U.S.C. (1970 ed.) 78*o*(c)(5), and former Section 19(a)(4) of the Act, 48 Stat. 898, 15 U.S.C. (1970 ed.) 78s(a)(4), are set forth in the Appendix, *infra*. pp. 1A to 3A.

QUESTIONS PRESENTED

1. Whether this case is moot.

2. Whether the Commission's authority under Section 12(k) of the Securities Exchange Act of 1934 summarily to suspend trading in a security "for a period not exceeding ten days" may be exercised at the expiration of an earlier ten-day suspension ordered pursuant to the same statute.

STATEMENT

1. Section 12(k) of the Securities Exchange Act of 1934, as added by Pub. L. 94–29, 89 Stat. 118, 15 U.S.C. (Supp. V) 78*l*(k), provides:

> If in its opinion the public interest and the protection of investors so require, the [Securities and Exchange] Commission is authorized summarily to suspend trading in any security * * * for a period not exceeding ten days * * *. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended.

Section 12(k) was enacted in 1975, to consolidate in a single provision the authority of the Commission under former Sections 15(c)(5) and 19(a)(4) of the Act, 78 Stat. 574 and 48 Stat. 898, 15 U.S.C. (1970 ed.) 78*o*(c)(5) and 78*s*(a)(4), which empowered the Commission to issue ten-day suspension orders respecting securities traded in the over-the-counter market and on exchanges.

2. On April 29, 1975, the Commission issued an order, pursuant to former Sections 15(c)(5) and 19(a)(4) of the Act, suspending public trading in the common stock of Canadian Javelin, Ltd. ("CJL") for ten days, because the Royal Canadian Mounted Police had commenced an extensive investigation into alleged manipulation of CJL common stock on the American Stock Exchange and several Canadian stock exchanges (App. 11, 12). The Commission determined that the suspension of trading was required in the public interest and for the protection of investors "pending an announcement by Canadian Javelin concerning the investigation by Canadian authorities" (App. 12). At the same time, the Commission, acting under Section 21(a) of the Act, commenced its own investiga-

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tion into allegations of manipulative activities by CJL insiders.

When the Commission's first order suspending trading expired, the Commission issued a second order suspending trading in CJL common stock for a further ten days. In all, a total of 37 separate, successive orders were issued, resulting in a continuous suspension of trading in CJL common stock from April 29, 1975, until May 2, 1976 (Pet. App. B, pp. 8a, 12a). Each order was preceded by a Commission determination that further suspension of trading was required in the public interest and for the protection of investors (App. 11–112).

On the basis of information the Commission obtained during its investigation of CJL, on April 26, 1976 the Commission filed a civil action in the United States District Court for the Southern District of New York. *Securities and Exchange Commission* v. *Doyle, et al.*, Civ. Action No. 76–1882 (S.D.N.Y.). The complaint alleged that the defendants had engaged in a scheme to manipulate the trading of CJL common stock on the American Stock Exchange and on two Canadian stock exchanges, *viz.*, by purchasing and selling large quantities of CJL common stock in order to create an illusion of widespread, *bona fide* buying interest when, in fact, these transactions were matched orders and wash sales,[1]

[1] "Wash" sales are transactions involving no change in beneficial ownership. "Matched" orders are orders for the purchase or sale of a security that are made with the knowledge that orders of substantially the same size, at substantially the same price, have been

designed artificially to increase and maintain the price of CJL stock. Once the public had an opportunity to become familiar with these allegations, the Commission permitted trading in CJL stock to resume.[2]

3. The Commission previously had issued a series of orders suspending trading in CJL common stock from November 29, 1973, through January 26, 1975, because, *inter alia*, CJL appeared to have disseminated false and misleading press releases concerning its business activities. See Securities Exchange Act Release No. 11172, 6 SEC Docket 53 (January 9, 1975). Respondent Samuel H. Sloan, who owns 13 shares of CJL stock (App. 115), had filed a petition for review of those suspension orders in the United States Court of Appeals for the Second Circuit (Pet. App. B, p. 8a). By the time the court of appeals heard argument in that case, the first series of suspension orders had terminated and the second series had begun. The court concluded that it could not undertake to review the second series of orders with the case in that posture (*Sloan* v. *Securities & Exchange Commission*, 527 F. 2d 11, 12 (C.A. 2), certiorari denied, 426 U.S. 935):

> We consider [respondent's] blunderbuss attack frivolous except for his allegation that the "tacking" of ten-day summary suspension orders by the SEC for an indefinite period constitutes an abuse of that agency's authority

or will be entered by the same or different persons for the sale or purchase of such security. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 205 n. 25.

[2] The Commission's action is still pending in the district court.

> and a deprivation of due process. * * * We cannot decide [the question] on the record before us. The record is entirely silent as to the reasons for the second series of suspensions, commencing in April of this year; we cannot tell whether they are based on substantial evidence, and hence cannot decide if they amount to an abuse of discretion by the SEC.

After observing that respondent might wish to challenge the second series of suspension orders as well as the first, and that the Commission was "willing * * * to grant [respondent] some sort of administrative hearing, thus satisfying any possible exhaustion [of remedies] requirement while also contributing to the record" (527 F. 2d at 12), the court dismissed the petition for review "without prejudice to [respondent's] repleading after an administrative hearing * * * from which judicial review may be sought" (*ibid.*).

4. In March 1976, pursuant to the court of appeals' suggestion, respondent asked the Commission to reconsider its orders suspending trading in CJL common stock (App. 113). In particular, respondent requested that the Commission refrain from issuing any further orders suspending trading in CJL stock, that the Commission declare its past suspension orders illegal, and that he be given an oral hearing before the Commission on his various requests (App. 113–120).

The Commission denied these requests (App. 109–110).[3] The Commission explained that the first series

[3] The next day, the Commission announced the adoption of informal procedures, of the kind applied to respondent, by which

of suspension orders had been based upon suspected violations of registration, reporting, and antifraud provisions of the securities laws and upon substantial allegations that CJL "had disseminated a series of press releases containing false and misleading information relating to its purported development of Panamanian mineral properties" (App. 109).[4] The Commission further explained that the second series of suspension orders had been issued "as a result of a lack of information concerning pending investigative action by Canadian regulatory authorities" (App. 110).

"any person adversely affected by a summary suspension pursuant to Section 12(k) of the Securities Exchange Act may obtain prompt consideration by the Commission of the reasons such person believes the continued suspension is not in the public interest or is not required for the protection of investors" (Pet. App. E, pp. 24a–26a; Securities Exchange Act Release No. 12361, 41 Fed. Reg. 18290). These procedures provide such persons with an opportunity for a hearing in the following circumstances (Pet. App. E, p. 25a):

"[I]f upon examination of the petition [requesting a hearing] the Commission is of the opinion that there is a genuine issue as to any material fact * * *. If no such opportunity is requested in the petition or if in the opinion of the Commission there is no genuine issue as to any material fact, the Commission will determine the issue upon the basis of the information contained in the petition and other relevant facts known to the Commission."

[4] The Commission instituted a civil action against CJL and certain of its principals based upon these allegations. *Securities and Exchange Commission* v. *Canadian Javelin, Ltd. et al.*, S.D. N.Y., No. 73–5074. On July 17, 1974, CJL and John C. Doyle, its president, consented to an order in that case permanently enjoining them from violating the reporting and antifraud provisions of the Securities Exchange Act. See Securities Exchange Act Release No. 11172, *supra*.

The Commission elaborated (*ibid.*):

> According to criminal informations returned in Canada, it appears that the common stock of Canadian Javelin may have been artificially manipulated on two Canadian stock exchanges, and that this was continuing after January 26, 1975. The Commission is actively investigating, among other things, possible manipulation of the stock in the United States securities markets. * * *
>
> In addition, a number of private civil suits are pending in Canada involving a dispute regarding control of the company. A Canadian provincial court recently issued an order installing a new board of directors and this order is now on appeal.[5]

5. Respondent then initiated this case by again petitioning for review in the United States Court of Appeals for the Second Circuit, challenging the validity of the suspension orders issued after April 29, 1975 (Pet. App. B, pp. 10a–11a). He contended, *inter alia*, that the issuance of successive ten-day suspension orders violated Section 12(k)'s limitation of such orders to "a period not exceeding ten days."

No suspension order was in effect with respect to CJL by the time the court of appeals heard argument. The court nevertheless rejected the Commission's argument that the case had become moot when the last suspension order expired on May 2, 1976. The court

[5] The Commission also noted that CJL was "delinquent with respect to the filing of its 10–K report" (App. 110).

held that "[b]ecause of the SEC's continuing policy of roll-over ten-day suspension orders, the harm to [respondent] was 'capable of repetition yet evading review'" (Pet. App. B, p. 16a).

On the merits, the court held that Section 12(k) does not authorize the Commission to issue consecutive suspension orders. The Court rejected the Commission's contention that when Congress amended the statute in 1964 and again in 1975, it had acquiesced in the Commission's practice of issuing such orders. The court concluded from the legislative history of the 1975 amendments that in cases of extended duration Congress expected the Commission to use its authority under Section 12(j) of the Act, 89 Stat. 118, 15 U.S.C. (Supp. V) 78*l*(j), which authorizes the agency to suspend or revoke the registration of a security for a period not exceeding twelve months if it finds after notice and opportunity for a hearing that the issuer has failed to comply with the Act or regulations thereunder.

The court concluded by directing the Commission "to discontinue forthwith its adoption and use of successive ten-day suspension orders to order the suspension of trading in a security for an extended period, *i.e.*, in excess of ten days" (Pet. App. B, p. 17a).[6]

[6] In its original opinion, the court of appeals had stated that its reading of the statute was supported by a provision of Section 12(k) authorizing the Commission, with the President's approval, summarily to suspend trading for a period not exceeding 90 days (Pet. App. B, p. 14a). On rehearing, the court excised that discussion from its opinion (Pet. App. C, pp. 19a–20a).

SUMMARY OF ARGUMENT

I. This case is moot as to respondent viewed narrowly in his capacity as a CJL shareholder. It may not, however, be moot as to respondent in his capacity as an investor generally. That issue turns upon whether any security held by respondent is likely to be subjected to successive orders suspending trading within the foreseeable future.

In these circumstances, in view of the large number of security issues respondent claims to own, application of principles of mathematical probability may be appropriate to a determination of the issue of mootness. At present, however, there are insufficient facts of record to permit assessment of the mathematical probability that at least one of the securities respondent owns will again be subject to consecutive orders suspending trading. If respondent furnishes additional information with respect to his holdings, we will endeavor to make that assessment. But the facts currently of record do not clearly establish the existence of a continuing live controversy.

II. A. Section 12(k) of the Act provides that, "[i]f in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security * * * for a period not exceeding ten days." The two limitations on the Commission's power to suspend trading—that the Commission determine that suspension is required by the public interest and the protection of investors, and that any single order remain in effect for not more than ten days—require

only that the Commission make a fresh determination every ten days as a prerequisite to the issuance of a successive order.

For example, there can be no doubt that if the Commission finds evidence of new manipulative activity shortly after expiration of an earlier suspension order, it may issue a second suspension order. It follows that, if the new evidence were discovered during the pendency of the first suspension order, the Commission could issue a successive order; no statutory purpose would be served by requiring an intervening period during which trading would resume in such circumstances. Thus the statute does not bar successive orders *per se*. Finally, nothing in the statute requires the Commission to consider only new evidence in evaluating the needs of the investing public. Therefore, if the Commission determines that existing conditions are such that the public interest and the protection of investors require a renewed suspension of trading, it may issue a successive suspension order even in the absence of evidence of new market disruption.

B. This construction is reflected in the Commission's consistent practice since 1944, when it first made use of the suspension power. When threats to fair and orderly markets that caused the Commission initially to suspend trading have continued for more than ten days, the Commission has reassessed the situation as each ten-day period expired to determine whether a further suspension was required. This longstanding and consistent administrative construction is entitled to great weight.

C. The administrative construction was endorsed by Congress in 1964 when it enacted former Section 15(c)(5), which extended the Commission's summary suspension authority to securities traded in the over-the-counter market. The Commission participated in the drafting of the amendment and explicitly advised Congress of its practice of issuing more than one suspension when it found at the end of the ten-day period that another suspension was necessary. In favorably reporting upon the amendment, the pertinent Senate committee expressly stated that it "accepts this interpretation." S. Rep. No. 379, 88th Cong., 1st Sess. 66–67 (1963).

D. Section 12(j) of the Act, which empowers the Commission to suspend or revoke the registration of a security after a hearing, does not imply a limitation on the Commission's power to suspend trading under Section 12(k). Section 12(j) differs in several important respects from Section 12(k). First, Section 12(j) applies only to securities subject to registration, whereas Section 12(k) applies to all publicly traded securities, whether or not registered. Second, Section 12(j) may be invoked only where the Commission finds misconduct by the *issuer*, whereas trading may be suspended under Section 12(k) whenever the public interest and the protection of investors so require, including situations that involve no misconduct by the issuer, *e.g.*, manipulation or fraud by third parties, corporate crises, situations where adequate financial information is unavailable or where markets have been disrupted by speculation based upon rumors of

doubtful accuracy. Third, where both provisions apply, suspension of trading under Section 12(k) may be used to protect investors while deregistration proceedings under Section 12(j) are pending. Fourth, suspension of trading under Section 12(k) is a temporary prophylactic measure aimed at preventing loss to investors because of unfair interferences with an orderly market; it contemplates a resumption of trading when the threat has passed. Under Section 12(j), however, the Commission makes a single determination revoking registration permanently or suspending it for a fixed term. Because deregistration not only eliminates exchange and over-the-counter markets for the issue involved, but also excuses the issuer from the reporting requirements of the Act, temporary suspension under Section 12(k), subject to periodic reexamination every ten days, carries less severe consequences for investors than the drastic remedy of deregistration.

In 1975, Congress consolidated the Commission's authority to suspend trading for ten-day periods in new Section 12(k) of the Act, and placed in Section 12(j) the Commission's authority to suspend or revoke the registration of the security for issuer misconduct. The amendments, however, did not effect any substantive change in the Commission's powers. The pertinent Senate committee indicated that it would expect the Commission to use Section 12(j) "rather than its ten-day suspension power in cases of extended duration." S. Rep. No. 94–75, 94th Cong., 1st Sess. 106 (1975). But, by so stating, the Committee was recommending only that in cases of extended dur-

ation to which both Section 12(j) and Section 12(k) apply, the Commission, in exercising its broad remedial discretion, ordinarily should initiate deregistration proceedings rather than rely upon the issuance of successive trading suspension orders. But even though the Committee expressed a preference as to how the Commission should proceed, it left the final decision as to the appropriate mode of enforcement in particular cases to the Commission's discretion.

E. The court of appeals' construction of Section 12 (k), barring the Commission from issuing a successive suspension order even when the public interest and the protection of investors so requires, defeats the remedial purpose of the statute. The Commission has found that, in many widely varying situations, protection of the investing public requires successive suspensions of trading in order to maintain orderly and fair capital markets. The court of appeals apparently was concerned over the impact on investors of successive suspensions. But such a concern goes to the soundness of the Commission's exercise of its discretion in particular cases, not to its statutory power to issue successive suspension orders.

ARGUMENT

I

THE FACTS OF RECORD IN THIS CASE DO NOT ESTABLISH THE EXISTENCE OF A CONTINUING LIVE CONTROVERSY

In the petition for a writ of certiorari, we pointed out that "[t]he suspension of trading in CJL stock

had been terminated in May 1976, prior to argument below and more than five months before the decision in this case" (Pet. 11), and we further explained (Pet. 12, n. 7):

> Trading in CJL stock was permitted to resume once all the facts relating to issuer misconduct had been made public. Since the investing public now has been apprised of the relevant facts, the concealment of which had threatened to disrupt the market in CJL stock, there is no reason to believe that it will be necessary to suspend trading again.

We contended that these considerations rendered the case moot as to respondent (Pet. 11–12; footnotes omitted):

> The court [of appeals] * * * concluded that the case was not moot, reasoning that "[b]ecause of the [Commission's] continuing policy of roll-over ten-day suspension orders, the harm to [respondent] was 'capable of repetition yet evading review'" [Pet. App. B, p. 16a]. But as this Court explained in *Weinstein* v. *Bradford*, 423 U.S. 147, 149, "*Sosna* [v. *Iowa*, 419 U.S. 393] decided that in the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Cf. *Securities and Exchange Commission* v. *Medical Committee for Human Rights*, 404

> U.S. 403. This is not a class action, and respondent has not shown that he is likely to be adversely affected by consecutive suspension orders in the future. Accordingly, respondent's case is moot and should not have been decided on the merits. Cf. *Securities and Exchange Commission* v. *Lea Fabrics, Inc.*, 363 U.S. 417.

In rejoinder, respondent asserted (Br. in Response, p. 18):

> As Respondent set forth in an affidavit filed with the court of appeals in opposition to the S.E.C.'s motion in that court to dismiss this case as moot, Respondent continues to own stock in nearly 400 publicly traded corporations and in view of the S.E.C.'s proclivity for issuing trading suspension orders, it is apparent that it is only a question of time before the S.E.C. suspends trading in another security so as to adversely affect Respondent.

In granting the petition for a writ of certiorari in this case, the Court directed the parties to "brief and argue the question of the possibility of mootness" (App. 213).

Our argument that the case became moot once trading in CJL stock was permitted to resume was directed to respondent principally in his capacity as a CJL shareholder. But, subject to certain qualifications, we agree with respondent that he may be entitled to rely upon his capacity as an investor generally in an effort to defeat a claim of mootness: in our view, the question of mootness in this case is whether CJL or any other security, while held by respondent, is

likely to be subjected to consecutive orders suspending trading within the foreseeable future.[7]

In the case of an ordinary individual shareholder, the evaluation of the issue of mootness in a context such as this would not be significantly affected by whether he was viewed in his capacity as an investor generally or merely in his capacity as a holder of the particular security initially at issue. We relied upon that consideration in arguing that the case was moot both before the court of appeals and in our petition for a writ of certiorari. But respondent in this Court has alleged ownership of such a large number of security issues (approximately double the number he claimed to own in the court of appeals; see App. 153), so that an application of principles of mathematical probability may be appropriate to a determination of the issue of mootness.

At present, however, we do not have sufficient facts at our disposal to assess the mathematical probability that at least one of the securities respondent owns will be subjected, while held by him, to consecutive orders suspending trading within the foreseeable future. Such an assessment would be based upon the relationship of three numbers—(1) the number of publicly traded corporations of which respondent is a shareholder; (2) the number of securities that may be expected to be subject to consecutive trading suspen-

[7] We do not mean to suggest that every shareholder of a corporation in whose securities trading has been suspended has standing to challenge the order of suspension. To have standing, a shareholder would be required to establish that he was aggrieved by the order, *e.g.*, that the order had the effect of freezing assets that he had a verifiable desire to liquidate.

sion orders in a single year; and (3) the number of corporate issuers that have publicly traded securities. The latter two numbers have been established to our satisfaction. First, "the Commission's power to issue consecutive 10-day suspension orders has been exercised with respect to an average of 20 securities each year for the past 12 years" (Pet. Reply Mem. 2–3), and it is not unreasonable to project that trend into the future (assuming *arguendo* that the Commission retains the power to issue such orders). Second, the Commission's staff has estimated that between 25,000 and 30,000 corporations have publicly traded stock.

But, the number of publicly traded corporations in which respondent owns shares now is in doubt. In the court of appeals, respondent stated only that he owned "securities of more than 200 corporate issuers" (App. 153). He now claims "to own stock in nearly 400 publicly traded corporations" (Br. in Response, p. 18). A more accurate count is necessary before a meaningful assessment of probability bearing upon mootness may be made.

Moreover, application of principles of mathematical probability ideally would require information about the nature of respondent's portfolio. If the bulk of the securities respondent owns are listed on the New York Stock Exchange, or are of other well established and widely held corporations (such as many banks and insurance companies whose shares are traded over the counter), the practical likelihood of a suspension order may be small indeed since suspension of trading in such securities is extremely

rare. On the other hand, if respondent's securities are predominantly those of less established issuers, there could well be a substantial probability that one of them will be subject to consecutive orders suspending trading within the next few years.[8]

If respondent submits an affidavit stating the precise number of publicly traded issues he owns, and the number of those that are listed on the New York Stock Exchange or are of large banks and insurance companies, and further shows that he will continue to hold approximately as many similar securities in the next five years, we can then make an adequate assessment whether there is a "reasonable expectation that [respondent, in his capacity as an investor, will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149. The facts of record at

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[8] If we assume that the securities respondent holds are randomly distributed with respect to the characteristics that lead to suspension of trading, the mathematical probability (P) that within a single year one of those issues will be subject to consecutive suspension orders is equal to

$$1-\frac{a!\ (a+b-n)!}{(a-n)!\ \ (a+b)!}$$

where a=the number of publicly traded issues respondent does not own, b=the number of such issues he does own, and n=the number of issues that will be subjected to consecutive suspension orders. See, *e.g.*, Freund, *Mathematical Statistics* 77–79 (2d ed.). If we posit a universe of 30,000 publicly traded issues and assume that respondent owns securities of 400 corporations, and therefore set a=29,600, b=400, and n=20, we find that P=.236. The mathematical probability that one of respondent's holdings will be subject to consecutive suspension orders within five years is $1-(1-P)^5$, or, upon these assumptions, approximately .740. In other words, the odds would be roughly three to one in favor of a consecutive suspension of trading in one of respondent's securities within the next five years, assuming that he will continue to hold approximately the same number of securities in this period.

present, however, are not sufficient to show a high probability that one of respondent's holdings will be subjected to a series of consecutive suspension orders in the near future; they therefore do not clearly establish the existence of a continuing live controversy, since, for the reasons stated in our petition for a writ of certiorari (Pet. 11–12), the case is moot as to respondent considered only in his capacity as a CJL shareholder.

II

UPON EXPIRATION OF A TRADING SUSPENSION ORDER ISSUED UNDER SECTION 12(k) OF THE SECURITIES EXCHANGE ACT, THE COMMISSION MAY ISSUE ANOTHER SUCH ORDER IF IN ITS OPINION THE PUBLIC INTEREST AND THE PROTECTION OF INVESTORS SO REQUIRE

Former Section 19(a)(4) of the Securities Exchange Act of 1934 granted the Commission authority summarily to suspend trading for ten days in securities listed on national exchanges. This authority was extended in 1964 to securities traded in the over-the-counter market, by the enactment of former Section 15(c)(5) of the Act. In 1975, these two provisions were consolidated in present Section 12(k) of the Act, which provides:

> If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days * * *.[9]

[9] Exempted securities include those issued or guaranteed by federal, state, or local governments, interests in certain kinds of trust funds, and other securities specifically exempted by the Commission. 15 U.S.C. (Supp. V) 78c(12).

Nothing in the language of this statute, or of its predecessors, bars the Commission from exercising the authority to suspend at the expiration of an earlier ten-day suspension. To the contrary, the consistent and long-standing administrative construction of these provisions is that the authority to suspend may be exercised whenever the Commission concludes that the public interest and the protection of investors so require. Congress has accepted this construction, which furthers the statute's remedial purpose.

A. THE LITERAL TERMS OF THE STATUTE DO NOT BAR ISSUANCE OF SUCCESSIVE SUSPENSION ORDERS

Section 12(k), like its predecessors, affirmatively grants to the Commission authority to suspend trading in individual securities. For the purposes of the present discussion, the only relevant limitations the statute places on that authority are (1) that, before an order to suspend trading is issued, the Commission must determine that the suspension is required by the public interest and the protection of investors, and (2) that any single order may remain in effect for not more than ten days. These two limitations do not bar the Commission from issuing a new suspension order upon the expiration of an earlier order. They necessitate only that, as a prerequisite to the issuance of a successive suspension order, the Commission reassess the circumstances pertaining to the security and make a fresh determination of what the public interest and the protection of investors require.

Consideration of a few examples dictates the conclusion that the Commission's power to suspend trading in a particular security is not exhausted by its first exercise. First, the statutory phrase "for a period not exceeding ten days" cannot mean that there may be only one period of suspension for each security. Thus, if the Commission detects a manipulative scheme affecting a security and therefore suspends trading in that security for ten days, it must retain the power to suspend trading anew if, 30 days later, it detects yet another manipulative scheme. The phrase "for a period not exceeding ten days" therefore can only be read as limiting the duration of a single suspension order, not as limiting the amount of time that a particular security may be subject to suspension of trading.

But if trading may be suspended anew upon the discovery of a second manipulative scheme 30 days later, surely a new suspension order also could issue if the second scheme were uncovered only ten days after the first had been detected, *i.e.*, upon the eve of the expiration of the first suspension order. No statutory purpose would be served by requiring an intervening period during which trading would resume, when discovery of a second manipulative scheme independently warrants a second suspension in the public interest and for the protection of investors. Thus the phrase "for a period not exceeding ten days" cannot reasonably be construed as barring successive suspension orders in all circumstances.

New evidence of manipulative activity justifies a successive suspension of trading because such evidence affords a basis for determining that the public interest and investors' protection require such a suspension. But nothing in the statute compels the Commission to consider only new evidence in evaluating the needs of the investing public. To the contrary, it is consistent with the statute for the Commission, even in the absence of new evidence of fresh manipulative activity, to determine that existing conditions are such that the public interest and the protection of investors require a renewed suspension of trading.

In short, the statutory language does not bar successive suspension orders at all. It requires only that the Commission make a new determination of the public interest, and of the needs of investors, before issuing a successive order suspending trading for a further ten-day period.

B. THE CONSISTENT AND LONG-STANDING ADMINISTRATIVE CONSTRUCTION IS THAT THE STATUTE AUTHORIZES SUCCESSIVE SUSPENSION ORDERS

The Commission's first use of its summary suspension power under the predecessor of Section 12(k) involved successive orders that resulted in the suspension of trading for almost one month. ***Elastic Stop Nut Corp. of America,*** Securities Exchange Act Release No. 3626 (November 29, 1944). Before 1964, when the Commission's summary suspension power was extended to securities traded in the over-the-counter market, the Commission had exercised that power with respect to 30 securities, and in only one

case was trading permitted to resume upon the expiration of the first ten-day suspension. See Goldman & Magrino, *Suspension of Trading in Securities: Some Observations on Section 15c(5) of the Securities Exchange Act of 1934*, 15 N.YL. Forum 633, 658–662 (1969); II Loss, *Securities Regulation* 852–854 (2d ed. 1961). Professor Loss had noted with respect to these suspensions (*id.* at 854):

> Although the suspension power * * * is limited to ten days, the Commission followed the policy in these cases of entering a series of orders until it was able to issue a release stating the essential facts. And * * * it timed the lifting of its suspension so that the public would have some opportunity to be informed of those facts before the resumption of exchange trading. Presumably a single ten-day suspension order does not exhaust the Commission's power * * * if it makes a new determination every ten days of the necessity of continuing the suspension * * *.

Until the decision in this case, the Commission consistently followed the practice described by Professor Loss. Between the enactment of the 1964 amendment and the decision of the court of appeals in November 1976, the Commission had exercised its authority summarily to suspend trading with respect to 941 securities; in 235 of these cases successive orders were issued resulting in the suspension of trading for more than ten consecutive days.[10]

[10] This information was derived by the Commission from a review of its records.

The situations in which the Commission has found that trading must be suspended in the public interest and for the protection of investors vary widely. Professor Loss has identified five general categories (V Loss, supra, at 2816–2822 (1969 Supp. to Vol. II)):

> (1) There have been a few cases of what might be called the "crisis" type * * * [as, for example, where t]he president resigned when it became known that he had withdrawn funds from the company. * * *
>
> (2) * * * [T]here is a group of cases in which the suspension was designed to prevent trading until the Commission might obtain appropriate injunctive relief, usually against fraud or manipulation or an unregistered distribution * * *.
>
> (3) Most of the cases have involved simply a severe inadequacy of (or sometimes misleading) financial information. * * *
>
> (4) In all the cases in the last category * * * the Commission ultimately permitted trading to resume. There is another group of about the same size in which the Commission instituted a delisting proceeding contemporaneously with or shortly after its first suspension order [pursuant to former Section 19(a)(2) of the Securities Exchange Act, the predecessor of Section 12(j) of the Act] which was based similarly on a severe inadequacy of financial information, so that in most cases trading, at least on an exchange, never did resume. * * *
>
> (5) * * * [When] the market ha[s] been strongly influenced by news or rumors of doubtful accuracy * * *.

With regard to each of these categories, the threats to fair and orderly markets that caused the original suspension may continue for more than ten days. Where this has been so, the Commission has reassessed the situation as each ten-day order expired, to determine whether a further suspension was required. This has been its consistent practice for the past 33 years, since the first suspension order was issued in 1944. The Commission's long-standing and consistent construction is entitled to great weight. See *E. I. duPont de Nemours & Co.* v. *Collins,* No. 75–1870, decided June 16, 1977 (slip op. 9); *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, 719; *Saxbe* v. *Bustos,* 419 U.S. 65, 74; *Investment Co. Institute* v. *Camp,* 401 U.S. 617, 626–627; *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 381; *Udall* v. *Tallman,* 380 U.S. 1, 16; *Power Reactor Co.* v. *Electricians,* 367 U.S. 396, 408.

C. CONGRESS HAS ENDORSED THE COMMISSION'S CONSTRUCTION OF THE STATUTE

Where Congress has reenacted or significantly amended a statute without disapproving the agency's construction, Congress may appropriately be considered to have approved that construction as correct. See, *e.g., United States* v. *Correll,* 389 U.S. 299, 305–306; *Fribourg Navigation Co.* v. *Commissioner of Internal Revenue,* 383 U.S. 272, 283; *Costanzo* v. *Tillinghast,* 287 U.S. 341, 345. Moreover, the agency's construction "carries most weight when the adminstrators participated in drafting [the legislation] and directly made known their views to Congress in committee hearings." *Zuber* v. *Allen,* 396 U.S. 168, 192.

These principles compel the conclusion that Congress has accepted and approved the Commission's practice of issuing consecutive ten-day suspension orders. At the time Congress enacted former Section 15(c)(5), extending the Commission's summary suspension authority to securities traded in the over-the-counter market, the Commission both participated in the drafting of the amendment and explicitly advised Congress of its long-standing practice, and the pertinent Senate Committee expressly endorsed the agency's construction.

The amendment adding former Section 15(c)(5) was drafted by the Commission's staff and submitted to Congress as part of the Commission's legislative program in 1963. Hearings on S. 1642 (SEC Legislation) before a Subcommittee of the Senate Committee on Banking and Currency, 88th Cong., 1st Sess., 1–2, 333–334 (1963) (hereinafter "Senate Hearings"). During the hearings on its legislative proposals, the Commission advised the House Committee on Interstate and Foreign Commerce (Hearings on H.R. 6789, H.R. 6793, S. 1642 (Securities Exchange Act of 1934 Amendments: Investor Protection) before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. 219 (1963) (hereinafter "House Hearings")):

> Under section 19(a)(4), the Commission has issued more than one suspension when, upon reexamination at the end of the 10-day period, it has determined that another suspension is necessary. At the same time the Commission has

> recognized that suspension of trading in a security is a serious step, and therefore has exercised the power with restraint and has proceeded with diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible. The Commission would follow that policy in administering the proposed new section 15(c)(5).

The Senate Committee on Banking and Currency, in reporting favorably on the proposed expansion of the Commission's trading suspension powers, confirmed that it understood and approved the Commission's long-standing statutory interpretation (S. Rep. No. 379, 88th Cong., 1st Sess. 66–67 (1963) (emphasis added)):

> The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the ten-day period, it determines that another suspension is necessary. *The committee accepts this interpretation.* At the same time the committee recognizes that suspension of trading in a security is a drastic step and that prolonged suspension of trading may impose considerable hardship on stockholders. The committee therefore expects that the Commission will exercise this power with restraint and will proceed with all diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible.

Subsequent to issuance of the Senate Report, the House Committee on Interstate and Foreign Commerce also favorably reported on the amendment (H.R. Rep. No. 1418, 88th Cong., 2d Sess. 24 (1964)), which Congress then enacted. Section 6(c) of Pub. L. 88–467, 78 Stat. 574.

D. THE COMMISSION'S SEPARATE AUTHORITY TO SUSPEND OR REVOKE THE REGISTRATION OF A SECURITY DOES NOT IMPLY A LIMITATION ON THE COMMISSION'S POWER TO SUSPEND TRADING

The Commission is empowered under Section 12(j) of the Act, the successor to former Section 19(a)(2) of the Act, 48 Stat. 898, to suspend, for a period not exceeding twelve months, or to revoke the registration of a security if it finds, after notice and opportunity for a hearing, "that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder." The court of appeals concluded that in cases of extended duration Congress intended the Commission to rely upon this authority rather than upon its authority to suspend trading under Section 12(k) (Pet. App. B, pp. 13a–14a). But the court did not grasp the significant differences between these two statutory authorities, and it misread the legislative history upon which it rested its conclusion.

1. Although a suspension of registration encompasses a suspension of trading, Sections 12(j) and 12(k) nevertheless differ in several important respects. First, Section 12(j), relating to suspension or revocation of registration, applies only to securities registered with the Commission, *i.e.*, securities traded on a national securities exchange or issued by

corporations having assets of $1 million or more and 500 or more shareholders. 15 U.S.C. 78*l* (b) and (g). In contrast, Section 12(k), relating to suspension of trading, applies as well to securities that need not be registered but nevertheless may be traded in the over-the-counter market. Thus the protections afforded by Section 12(k) extend to a broader spectrum of securities.

Second, Section 12(j) may be invoked only where the Commission finds misconduct by the issuer. But trading may be suspended under Section 12(k) whenever the public interest and the protection of investors so require, including situations that involve no misconduct by the issuer, *e.g.*, in cases involving manipulation or fraud by third parties,[11] in corporate

[11] An example involving manipulative activities by persons unconnected with the issuer, to which Section 12(j) is inapplicable, is provided by the history of the suspension of trading in the stock of Power Conversion, Inc. ("Power"). On October 6, 1972, the Commission suspended trading in Power's common stock for ten days because of "unusual market activity in Power's securities and the lack of information to account for the activity." Securities Exchange Act Release No. 9810 (October 10, 1972). See also Securities Exchange Act Release No. 10002 (February 12, 1973). The stock had been publicly offered at $5 per share in March 1972 but had risen to a bid price of $45.25 shortly before the suspension. In the two trading days immediately preceding the suspension, the bid price declined from $39.75 to $5. *Ibid.* Power management stated that it was aware "of no internal development * * * to justify [either] the rapid price increase * * * or its subsequent rapid price decline." *Ibid.* Subsequently, it was determined that a trader in Power common stock "was deeply involved in a scheme to defraud and manipulate the market in Power." *Ibid.* After this information was disseminated to the public, trading in Power stock was permitted to resume.

crises, in situations where adequate financial information is unavailable and where markets have been disrupted by speculation based upon rumors of doubtful accuracy.[12] In the latter situations, the Commission is without authority to act under Section 12(j): even when the disruptive conditions persist for more than ten days, suspension of trading under Section 12(k) remains the only effective protection immediately available to investors.

Third, as Professor Loss has noted (see p. 25, *supra*), in situations where both Section 12(j) and Section 12(k) apply, suspension of trading under Section 12(k) may be used to complement deregistration proceedings under Section 12(j), in order to

[12] For example, the Commission has suspended trading at the request of an issuer in order that the issuer could "make available to its shareholders and to the general public certain material financial and other information which was not available to the investing public or to the stockholders generally." Securities Exchange Act Release Nos. 8346, 8365 (June 26, 1968; July 29, 1968). See also, *e.g.*, Securities Exchange Act Release Nos. 8088, 8182 (May 26, 1967; October 20, 1967). See V Loss, *supra* at 2819–2821.

During the past year, the Commission suspended trading in a number of related railroad stocks, at the request of the corporations involved, "pending announcement by Penn Central Transportation Company of its proposed plan of reorganization." See Securities Exchange Act Release Nos. 13064, 13505 (December 13, 1976; May 4, 1977).

In addition, there have been occasions when courts have advised the Commission that a decision was imminent in an action pending before the court that might have an impact on the market for a particular security. In such circumstances, the Commission sometimes has suspended the trading of the security to allow time for investors to consider the implications of the decision. See Securities Exchange Act Release No. 11208 (January 24, 1975).

ensure that investors remain protected while such proceedings are pending. The Commission may suspend or revoke registration under Section 12(j) only after it determines "on the record after notiice and opportunity for hearing" that an issuer violated the Act or regulations thereunder. It is impossible, within a ten-day period, for the Commission to (a) conduct an investigation sufficient to determine whether an administrative proceeding pursuant to Section 12(j) ought to be instituted; (b) provide the issuer with adequate notice of the alleged violations; (c) hold a hearing on the record before an administrative law judge;[13] (d) permit the administrative law judge to consider the matter prior to rendering an initial decision; and (e) review the initial decision rendered by the administrative law judge. If Section 12(j) were the only remedy available where the market disruption is of extended duration, trading in a security affected by manipulative activity could then resume upon the expiration of the first ten-day trading suspension order and continue until the deregistration proceedings were completed months later. In the meantime, investors would be exposed to serious risk of injury.

Fourth, Sections 12(j) and 12(k) differ significantly in the way that they protect investors. Suspension of trading under Section 12(k) is a temporary prophy-

[13] As a general rule, at least six months is required to hold a hearing "on the record after notice and opportunity for hearing * * *." See Rules 6 through 22 of the Commission's Rules of Practice, 17 C.F.R. 201.6 through 201.22.

lactic measure the need for which must be determined *de novo* by the Commission every ten days. Trading is permitted to resume when the threat has passed. Moreover, when trading is suspended under Section 12(k), the issuer remains subject to, *inter alia*, the periodic reporting requirements and proxy provisions of the Act, and officers and directors of the issuer and beneficial owners of more than 10 percent of the issuer's stock must continue to file ownership reports with the Commission. See 15 U.S.C. 78m, 78n, and 78p. These important protections are lost when the registration of a security is revoked pursuant to Section 12(j). As Professor Loss has observed (II Loss, *supra*, at 845):

> The remedy [of deregistration] is Draconian. When management fails to comply with some provision of the act or the Commission's rules—perhaps because it would just as soon be done with the obligations of registration anyway—it makes little sense to visit the sin on the innocent security holders by depriving them of an exchange market, not to mention the statutory advantages of registration.[14]

[14] Under present law (Section 12(j)), security holders would also be deprived of the over-the-counter market.

During the first decade of its existence, the Commission instituted 76 deregistration proceedings pursuant to former Section 19(a)(2) of the Act. Substantially all of these proceedings involved "small companies with negligible assets and little or no investor interest * * *." II Loss, *supra*, at 846. The Commission has rarely used that authority since 1944. As the Commission explained to Congress in 1963: "The sanction of delisting for fail-

2. When the Securities Acts Amendments of 1975 were enacted, the provisions formerly containing the Commission's authority to suspend trading were consolidated in new Section 12(k) of the Act. Section 9 of Pub. L. 94–29, 89 Stat. 118. The report of the Senate Committee on Banking, Housing and Urban Affairs explained that Section 12(k) was intended merely to restate and "consolidate in one place the power the SEC presently has under [former] sections 15(c)(5) and 19(a)(4)." S. Rep. No. 94–75, 94th Cong., 1st Sess. 106 (1975). There is no indication that any substantive change was intended.

At the same time, Congress transferred the Commission's authority to suspend or revoke registration from Section 19(a)(2) to new Section 12(j), and added a provision making it unlawful for a broker or dealer to trade in securities whose registrations had been suspended or revoked."[18]

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ure to comply with the provisions of the act has been imposed only infrequently by the Commission because delisting would have the effect of relieving the issuer of the duty of complying with the disclosure provisions of the act and would deprive investors of an exchange market for the trading of their securities." Senate Hearings, *supra*, 403; House Hearings, *supra*, 183.

[18] The proposal to shift Section 19(a)(2) to Section 12(j) originated in 1973 in S. 2519, 93d Cong., 1st Sess. That bill made no reference to the Commission's power to suspend trading. The Senate Report stated that "[t]his subsection would merely provide a more logical placement of the authority the SEC already has under present Section 19(a)(2)." S. Rep. No. 93–865, 93d Cong., 2d Sess. 43 (1974).

The Senate Committee explained (S. Rep. No. 94–75, *supra*, at 106):

> Subsection (j) would provide a more logical placement of the authority the SEC already has under present section 19(a)(2) to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to withdraw the registration of any security if it finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of the Exchange Act or the rules and regulations thereunder. It would also make unlawful any trading in any such security by any broker or dealer. With this change, the Commission is expected to use this section rather than its ten-day suspension power in cases of extended duration.

The court of appeals read the final sentence of that passage as indicating a legislative intent to deprive the Commission of power to issue successive suspension orders with respect to a particular security. That is an unduly broad reading of a sentence that is no more than precatory. Indeed, correctly read, that sentence refutes the holding of the court of appeals, for it implies that the Committee knew that the Commission continued to possess the authority, which the Committee had approved in 1964 (see pp. 26–29, *supra*), to issue successive trading suspension orders "in cases of extended duration." Moreover, the Committee presumably was aware that the powers conferred by Sections 12(j) and 12(k) are different in important respects (see pp. 29–33, *supra*).

Thus the plain purport of the sentence upon which the court of appeals relied is simply that the Senate Committee was recommending that in cases of extended duration to which both Section 12(j) and Section 12(k) apply, the Commission, in exercising its broad remedial discretion, ordinarily should initiate deregistration proceedings rather than rely upon the issuance of successive trading suspension orders. In other words, the Committee expressed a preference as to how the Commission should proceed, but it left the final decision as to the appropriate mode of enforcement in particular cases to the Commission's discretion. If the Committee had intended to terminate or circumscribe the authority it had earlier acknowledged to exist under the predecessors of Section 12(k), it would have done so in the text of Section 12(k) itself; it cannot be presumed to have done so merely by including precatory language in a section of its report that discusses a different provision of the Act.

E. THE COMMISSION'S CONSTRUCTION FURTHERS THE STATUTE'S REMEDIAL PURPOSE

This Court repeatedly has emphasized that the federal securities laws should be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195. See also *Superintendant of Insurance of New York* v. *Bankers Life & Casualty Co.*,

404 U.S. 6, 12; *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151.

The court of appeals' construction of Section 12(k), barring the Commission from ordering "the suspension of trading in a security for an extended period, i.e., in excess of ten days" (Pet. App. B, p. 17a), defeats the remedial purpose of the statute. In many widely varying situations, the Commission has found that the remedial purposes of the statute require successive suspension of trading in particular securities, in order to maintain orderly and fair capital markets (see pp. 23–26, *supra*). Nothing in Section 12(k) or elsewhere in the Act deprives the Commission of power to issue successive suspension orders, provided only that the Commission determines, at the time of each new order, that a further period of suspension is required by the public interest and for the protection of investors.

The court of appeals apparently was concerned over the impact on investors of successive trading suspensions. But such a concern goes to the soundness of the Commission's exercise of its discretion in particular cases, not to its statutory power to issue more than one ten-day suspension order. We may assume, for argument, that in some situations the issuance of successive suspension orders over a prolonged period may constitute an abuse of discretion that a reviewing court may correct. In this proceeding, however, the court of appeals disposed of the case on the basis of "statutory construction and inter-

pretation" (Pet. App. B, p. 17a), not on grounds of abuse of discretion.

The Commission's experience between 1964 and the date of the decision below shows that in approximately 25 percent of the instances in which it has issued trading suspension orders, investors would not have been sufficiently protected if trading were to resume after ten days (see p. 24, *supra*). The decision below drastically and improperly weakens an important tool by which the Commission protects investors against unfair and disorderly markets in individual securities.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 12(j) and (k) of the Securities Exchange Act of 1934, as added, Pub. L. 94-29, 89 Stat. 118, 15 U.S.C. (Supp. V) 78*l*(j) and (k), provides:

> (j) The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.
>
> (k) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading in any security (other than an exempted security) for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any na-

tional securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding ninety days. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended.

Former Section 19(a)(4) of the Securities Exchange Act of 1934, 48 Stat. 898, 15 U.S.C. 78s(a)(4), provided in pertinent part:

> Sec. 19.(a). The Commission is authorized, ized, if in its opinion such action is necessary or appropriate for the protection of investors—
>
> * * * * *
>
> (4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

Former Section 15(c)(5) of the Securities Exchange Act of 1934, as added, 78 Stat. 574, 15 U.S.C. 78*o*(c)(5), provided in pertinent part:

> (5) If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading, otherwise than on a national securities exchange, in any security (other than an ex-

empted security) for a period not exceeding ten days. No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended.

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